By Electronic Mail

October 10, 2006

Lawrence M. Norton, Esq.
General Counsel
Federal Election Commission
999 E Street NW
Washington, DC 20463

Re: Comments on AOR 2006-32 (PFAVF/PFA)

Dear Mr. Norton:

These comments are filed on behalf of the Campaign Legal Center and Democracy 21 in regard to Advisory Opinion Request (AOR) 2006-32, filed on behalf of Progress for America Voter Fund (PFAVF) and Progress for America (PFA), seeking advice as to whether specific proposed activities constitute the making of "expenditures" and the solicitation of "contributions" under the Federal Election Campaign Act (FECA). AOR 2006-32 (Aug. 25 letter) at 3-7. Additionally, PFAVF and PFA seek advice as to whether the timing of the organizations' spending or certain specific public communications by the organizations would establish either organization's "major purpose" as influencing candidate elections, thereby requiring "political committee" regulation under FECA. AOR 2006-32 (Aug. 25 letter) at 7-9.

For the reasons set forth below, we believe it would be improper and inappropriate for the Commission to answer this AOR with regard to PFAVF, a section 527 group, because the issues presented here are central to the resolution of a pending enforcement action involving the same requestor. The Commission must decide these issues in the context of the enforcement action before issuing any advisory opinion to PFAVF on the matter, and should not have the enforcement action effectively pre-empted by this advisory opinion request.

If the Commission does, wrongly, respond on the merits to the questions presented by PFAVF, it should advise PFAVF that it is a "political committee" under 2 U.S.C. § 431(4), subject to FECA "political committee" registration and reporting requirements, as well as to the contribution limitations and source prohibitions applicable to political committees. The Commission should not answer these questions with regard to PFA, a section 501(c)(4) group, because the request does not present information sufficient to determine whether PFA has a "major purpose" to influence federal elections.

I. The Commission Should Decline to Answer This AOR Because It Raises Dispositive Issues in a MUR Still Pending Against PFAVF.

On July 21, 2004, Democracy 21, the Campaign Legal Center, and the Center for Responsive Politics filed a complaint with the Commission against PFAVF (MUR 5487), alleging that PFAVF is a federal "political committee" operating in violation 2 U.S.C. §§ 432, 434, 441a and 441b(a), and 11 C.F.R. § 114.4, as a result of its failure to register with the Commission as a "political committee," and its failure to comply with the FECA contribution limitations, source prohibitions and reporting requirements that are applicable to political committees. The Commission has taken no publicly disclosed action on this complaint, and therefore it is reasonable to assume that the MUR is still pending.

The Complaint alleged that PFAVF "made clear that its major, indeed overriding, purpose is to support the re-election of President George W. Bush in the 2004 election and to defeat the Democratic nominee, Senator John Kerry." MUR 5487, Complt. at ¶ 9. It cited a published report that PFAVF officials were considering "major purchases of television ads in roughly 18 key battleground states that praise Bush administration policies." *Id.* at ¶ 10. It noted that PFAVF on its website stated that it is producing TV ads "on President Bush's plan to revitalize the American economy and wage a world-wide war on terror," and that future TV ads "will expose John Kerry's record as the most liberal member of the United States Senate – even more liberal than Teddy Kennedy or Hillary Clinton." *Id.* at ¶ 11. A PFAVF press release stated that formation of the Voter Fund "will give us the additional flexibility we need *to affect the political process*," and "the ability to promote President Bush's record on key issues and expose the real John Kerry's ultra-liberal agenda, as well as the record of other liberal candidates." *Id.* at 12 (emphasis added). Another PFAVF press release stated that one of its ads is "the first step in a multimillion dollar advertising campaign to counter the pro-Democratic groups that have spent more than $40 million on ads criticizing [President] Bush." *Id.*

The complaint alleged that PFAVF, as a section 527 organization, had a "major purpose" to influence federal elections because of its intent to spend millions of dollars promoting President Bush and attacking his election opponent, Senator Kerry. *Id.* at ¶¶ 23-26. The complaint further alleged that PFAVF's promote/attack ads were "expenditures" under FECA, and therefore that the group met the test for "political committee" status. *Id.* at 27-33.

This AOR raises numerous issues identical to those raised in MUR 5487, including whether PFAVF is a political committee, how to apply the "major purpose" test to PFAVF's activities, and what standard is to be used in applying the definition of "expenditure" to PFAVF's spending.

Given that these questions are central to the outcome of the pending MUR, it would be improper and inappropriate for the Commission to decide these questions first in the context of this AOR. The Commission should not allow a respondent in an enforcement action to pre-empt the enforcement process simply by filing an AOR that poses questions on the legal issues that are central to the enforcement action. Allowing respondents to control and shift the forum in this way would seriously undermine the Commission's enforcement process by having dispositive legal issues resolved on a summary basis at the instigation of the respondent, but outside the

context of the factual information developed in the enforcement investigation. Rather, in these circumstances, where a respondent in a long-pending enforcement action files an AOR seeking an advisory opinion on the key issues pending in the enforcement action, the Commission should decline to answer the questions in the advisory process until the issues have been resolved in the enforcement process.

II. PFAVF is a Federal "Political Committee."

Should the Commission nonetheless wrongly decide to reach the merits of the questions presented by PFAVF in the AOR, it should find that PFAVF meets the test for "political committee" status under FECA.

Section 431(4) of Title 2 defines the term "political committee" to mean "any committee, club, association or other group of persons which receives contributions aggregating in excess of $1,000 during a calendar year or which makes expenditures aggregating in excess of $1,000 during a calendar year." 2 U.S.C. § 431(4); *see also* 11 C.F.R. § 100.5(a). A "contribution," in turn, is defined as "any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office…." 2 U.S.C. § 431(8)(A). And an "expenditure" is defined as "any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office.…" 2 U.S.C. § 431(9)(A).

In *Buckley v. Valeo*, 424 U.S. 1 (1976), the Supreme Court construed the term "political committee" to "only encompass organizations that are under the control of a candidate *or the major purpose of which is the nomination or election of a candidate*." 424 U.S. at 79 (emphasis added). In *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986), the Court again invoked the "major purpose" test and noted that if a group's independent spending activities "become so extensive that *the organization's major purpose may be regarded as campaign activity*, the corporation would be classified as a political committee." 479 U.S. at 262 (emphasis added). In that instance, the Court said the group would become subject to the "obligations and restrictions applicable to those groups *whose primary objective is to influence political campaigns*." *Id.* (emphasis added). The Court in *McConnell v. FEC*, 540 U.S. 93 (2003) restated the "major purpose" test for political committee status as iterated in *Buckley*. 540 U.S. at 170 n.64.[1]

Thus, PFAVF is a "political committee" if it meets both parts of a two-prong test for political committee status: (1) it has a "major purpose" to influence elections and (2) it receives $1,000 in "contributions" or makes $1,000 in "expenditures."

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[1] In *FEC v. GOPAC*, 917 F. Supp. 851 (D.D.C. 1996), a single federal district court further narrowed the "major purpose" test to encompass not just the nomination or election of any candidate, but only "the nomination or election of a particular candidate or candidates for federal office." 917 F. Supp. at 859. Thus, the court said that "an organization is a 'political committee' under the Act if it received and/or expended $1,000 or more and had as its major purpose the election of a particular candidate or candidates for federal office." *Id.* at 862. The court further said that an organization's purpose "may be evidenced by its public statements of its purpose or by other means, such as its expenditures in cash or in kind to or for the benefit of a particular candidate or candidates." *Id.*

A. PFAVF's "Major Purpose" is Influencing Elections.

PFAVF is organized under section 527 of the Internal Revenue Code, 26 U.S.C. § 527, and is thus, by definition, a "political organization" that is operated "primarily" for the purpose of influencing candidate elections.

Section 527 provides tax exempt treatment for "exempt function" income received by any "political organization." The statute defines "political organization" to mean a "party, committee, association, fund, or other organization (whether or not incorporated) *organized and operated primarily for the purpose of directly or indirectly accepting contributions or making expenditures, or both, for an exempt function*." 26 U.S.C. § 527(e)(1) (emphasis added). An "exempt function" is defined to mean the "function of *influencing or attempting to influence the selection, nomination, election, or appointment of any individual* to any Federal, State, or local public office or office in a political organization, or the election of Presidential or Vice Presidential electors…." 26 U.S.C. § 527(e)(2) (emphasis added).

Thus, any entity that registers with the IRS as a "political organization" under section 527 is "organized and operated primarily" for the purpose of "influencing or attempting to influence the selection, nomination, election or appointment of" an individual to public office.

For this reason, the Commission has correctly cited the section 527 standard as identical to the "major purpose" prong of the test for "political committee" status. *See, e.g.*, Ad. Ops. 1996-13, 1996-3, 1995-11.

The Supreme Court in *McConnell v. FEC*, 540 U.S. 93 (2003) recognized that section 527 groups are primarily engaged in influencing elections. The Court stated, "Section 527 'political organizations' are, unlike § 501(c) groups, organized for the express purpose of engaging in partisan political activity." 540 U.S. at 174 n.67. The Court also noted that 527 groups "by definition engage in partisan political activity." *Id.* at 177.

Accordingly, any group that chooses to register as a "political organization" under section 527 is *by definition* an entity "the major purpose of which is the nomination or election of a candidate…."[2] Under the "major purpose" standard set forth in *Buckley*, this is sufficient to meet the first prong of the "political committee" test.[3] Even if that standard is further narrowed by the *GOPAC* test, the facts presented in the AOR indicate that PFAVF has a "major purpose" of influencing the nomination or election of a "particular candidate or candidates for federal office…." 917 F. Supp. at 859.

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[2] This would be true in all instances other than a 527 organization which is devoted to influencing the nomination or appointment of individuals to appointive office such as, *e.g.*, a judicial appointment.

[3] Of course, if the 527 group is involved only in influencing State and local candidate elections, it would not be a federal political committee because it would not meet the second prong of the test, *i.e.*, it would not be receiving federal "contributions" or making federal "expenditures."

In addition, an organization's "major purpose" may be "evidenced by its public statements of its purpose or by other means…." *FEC v. Malenick*, 310 F. Supp. 2d 230, 234 (D.D.C. 2004) quoting *FEC v. GOPAC, Inc.*, 917 F. Supp. 851, 859 (D.D.C. 1996); *see also* Ad. Op. 2006-20 (Unity 08) (quoting *Malenick* and *GOPAC*).[4]

Public statements by PFAVF make clear that its "major purpose" is to influence federal elections in 2006 and beyond. PFAVF states in its AOR that it intends to disseminate its messages "in jurisdictions where the debate is most focused, and that most often comes in the context of high-interest elections," using candidates for federal office as its spokespersons. AOR 2006-32 (Aug. 25 letter) at 2. PFAVF further indicates that it plans to spend "about 70 percent" of its budget prior to the November 4, 2006 federal election, AOR 2006-32 (Sept. 22 letter) at 1, in an effort to keep the record straight "on the campaign trail," AOR 2006-32 (Aug. 25 letter) at 1. The specific communication scripts proposed by PFAVF undoubtedly constitute public statements making clear the organization's "major purpose" of influencing federal elections.

For example, "Planned Communication #1," which PFAVF intends to disseminate in the weeks leading up to the November 4 election, would clearly identify a federal candidate as "the best man to lead us in the war against terror," and state that the candidate's named opponent does not have "what it takes," and "doesn't have the resolve." Similarly, "Planned Communication #2," which PFVAF intends to disseminate in the weeks leading up to the November 4 election, would name a federal candidate and state that the candidate "has the strength and courage to lead us to victory." During the weeks leading up to the November 4 election, PFAVF intends to disseminate "Planned Communication #3," soliciting contributions to support its favored candidates by stating:

> We urgently need your help to level the playing field! As you know, a vast network of liberal 527 organizations are outspending [PFAVF's preferred federal candidate] on television ads by a significant margin. These extremists have already raised more than $20 million in a relentlessly negative and intensely personal assault against [PFAVF's preferred federal candidate]'s agenda….

PFAVF's "Planned Communication" nos. 1, 2, 3, 5, 7, 8, 9, and 10 *all* clearly identify candidates for federal office, and support or oppose those candidates. Again, PFAVF intends to spend 70% of its 2006 budget prior to the November 4 federal election disseminating these communications to voters.[5]

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[4] An organization's public statements include any documents or materials disseminated or available to the public. The court in *Malenick*, for example, considered a wide range of materials produced by defendant Carolyn Malenick's organization, Triad Management Services, including a brochure, letters, faxes, and testimony by a Triad official stating that it "was the objective of the whole TRIAD concept to get major donors involved so that the ideally conservative candidates could be elected…." *Malenick*, 310 F. Supp. 2d at 235.

[5] PFAVF specifically asks whether "Planned Communication" nos. 11, 12, 14, and 15 would establish PFAVF's "major purpose" to influence elections, with respect to the organization's "political committee" status. "Planned Communication" nos. 12, 14 and 15 discuss PFAVF's activities "on the campaign trail," "in battleground states," and in "key states across the country," all of which are

Based on PFAVF's status as a "political organization" under section 527 of the IRC – an organization operated "primarily" for the purpose of "accepting contributions or making expenditures" – or on PFAVF's description of its activities, the Commission should conclude that PFAVF has a "major purpose" of influencing federal elections in 2006 and beyond.

B. PFAVF's Payments for its "Planned Communications" Will Constitute "Expenditures."

As a "major purpose" organization, PFAVF is a "political committee" under 2 U.S.C. § 431(4)(A) if it receives $1,000 in "contributions" or makes $1,000 in "expenditures" during a calendar year.

i. The definition of "expenditure." FECA defines "expenditure" to include any disbursement "made by any person for the purpose of influencing any election for Federal office." 2 U.S.C. § 431(9); *see also* 11 C.F.R. § 100.111(a). The definition of "expenditure" is not limited by the "express advocacy" standard when applied to a "major purpose" group. Rather, as applied to a "major purpose" group, the applicable definition of "expenditure" is the statutory language itself – disbursements made "for the purpose of influencing" any federal election – regardless of whether the disbursements are for "express advocacy" communication.

This conclusion follows from *Buckley*. There, the Supreme Court made clear that the "express advocacy" limitation which it imposed on the statutory definition of "expenditure" does not apply to an entity which has a "major purpose" to influence candidate elections. The Court stated that such entities "can be assumed to fall within the core area sought to be addressed by Congress. They are, by definition, campaign related." 424 U.S. at 79. Thus, such entities are not vulnerable to concerns of vagueness in drawing a line between issue discussion and electioneering activities.

By contrast, the Court developed and applied the "express advocacy" test only to spenders *other than* "major purpose" groups:

> But when the maker of the expenditure is not within these categories – *when it is an individual other than a candidate or a group other than a "political committee"* – the relation of the information sought to the purposes of the Act may be too remote. To insure that the reach of [the disclosure provision] is not impermissibly broad, we construe "expenditure" for purposes of that section in the same way we construed the terms of [the spending limit] – to reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate.

Id. at 79–80 (emphasis added).

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indicative of its major purpose to influence elections. "Planned Communication No. 11," similarly, notes PFAVF's purpose is to "affect the political process."

The Court in *Buckley* thus made a crucial distinction: when the spender is an organization with a "major purpose" to influence candidate elections, the statutory definition of "expenditure" as spending "for the purpose of influencing" a federal election is sufficiently clear to be facially constitutional, because such organizations "are, by definition, campaign related" and their spending "can be assumed" to fall within the area properly regulated by Congress. Therefore, there is no need for an "express advocacy" limitation on the definition of "expenditure" in order to save the term from vagueness.

By contrast, when the spender is any other kind of organization – any organization which does *not* have a "major purpose" to influence elections – then a narrowing construction of "expenditure" is required in order to avoid constitutional problems of vagueness.

The Court affirmed this analysis in *McConnell*, where it cited and quoted the same language from *Buckley* in rejecting a vagueness challenge to the "promote, support, attack or oppose" standard in BCRA as applied to political party committees. 540 U.S. at 170 n.64.

For this reason, the "express advocacy" test, which the Supreme Court deemed to be "functionally meaningless," *McConnell*, 540 U.S. at 218, is not relevant to the question of whether a "major purpose" organization is spending money for the purpose of influencing the election of federal candidates, and whether it is, accordingly, making "expenditures."[6]

ii. The definition as applied to PFAVF's spending. PFAVF has asked whether payments for "Planned Communication" nos. 1 and 2 would constitute "expenditures" under FECA "for purposes of determining political committee status." AOR 2006-32 (Aug. 25 letter) at 3–4. As discussed above, the statutory definition of "expenditure," not the "express advocacy" test, applies to PFAVF as a "major purpose" organization.

Payments by PFAVF *not only* for "Planned Communication" nos. 1 and 2, *but also* for "Planned Communication" nos. 3, 5, 7, 8, 9, and 10, would be "for the purpose of influencing" federal elections and, therefore, would be "expenditures" under FECA.

PFAVF's "Planned Communication" nos. 1, 2, 3, 5, 7, 8, 9, and 10 *all* promote or attack clearly identified candidates for federal office and, given the fact that they would be disseminated by an organization with a "major purpose" to influence elections, "can be assumed to fall within the core area sought to be addressed by Congress." *Buckley*, 424 U.S. at 79.

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[6] Indeed, the Commission made clear in its adoption last week of Ad. Op. 2006-20 (Unity 08) that the FECA definition of "expenditure" is not limited by the "express advocacy" standard when determining a "major purpose" organization's "political committee" status. The Commission advised Unity 08 that "monies spent by Unity 08 to obtain ballot access through petition drives will be expenditures." Unity 08's proposed disbursements to obtain ballot access involved no "express advocacy." *See also*, Ad. Op. 1994-05 n.1 and Ad. Op. 1984-11 (finding non-express advocacy payments to be "expenditures'). The Commission made clear that Unity 08 has a "major purpose" to influence the 2008 elections, and that once Unity 08 makes over $1,000 in non-express advocacy "expenditures" to obtain ballot access, it will become a political committee and, as such, must comply with FECA contribution limits, source prohibitions and reporting requirements.

For example, "Planned Communication #1," which PFAVF intends to disseminate in 2006, 2007 and 2008, would identify a federal candidate in the next election as "the best man to lead us in the war against terror," and state that the candidate's named opponent does not have "what it takes," and "doesn't have the resolve." An advertisement comparing a federal candidate to his/her opponent, praising one and criticizing another, is clearly for the purpose of influencing a federal election. Payment for such an advertisement would be an "expenditure" under FECA.

Similarly, "Planned Communication #2," which PFAVF intends to disseminate in 2006, 2007 and 2008, would identify a federal candidate in the next election as the candidate that "has the strength and courage to lead us to victory," while criticizing "one of the nation's most liberal senators." Again, an advertisement by a "major purpose" organization praising a federal candidate and criticizing another federal officeholder is clearly for the purpose of influencing a federal election, and payment for such an ad would be an "expenditure" under FECA.

PFAVF intends to disseminate "Planned Communication #3" during the weeks leading up to the November 4, 2006 election, stating that liberals are outspending a specific federal candidate, and asking for help from the recipient of the communication to "level the playing field" for the federal candidate. "Planned Communication #3" is (as discussed in the following section) a solicitation for "contributions" under Commission regulations. Payments for dissemination of "Planned Communication #3" would be for the purpose of influencing a federal election and would therefore be "expenditures" under FECA.

"Planned Communication" nos. 5, 7, 8, 9, and 10 are more of the same – praising or criticizing, or urging support for or opposition to clearly identified federal candidates, and here, in close proximity to elections in which those candidates are on the ballot. Any PFAVF payments for creation or dissemination of "Planned Communication" nos. 1, 2, 3, 5, 7, 8, 9, and 10 would be for the purpose of influencing federal elections and would, therefore, be "expenditures" under FECA. In the event that such "expenditures" exceeded $1,000, PFAVF would be a "political committee" under 2 U.S.C. § 431(4)(A) and would be required to comply with the FECA contribution limitations, source prohibitions and reporting requirements established by 2 U.S.C. §§ 433, 434, 441a, and 441b.

C. PFAVF's Proposed Solicitations Will Result in the Receipt of "Contributions."

PFAVF will also trigger "political committee" status if it receives $1,000 in "contributions." It asks whether funds received in response to "Planned Communication" nos. 3, 5, 7, 8, 9, and 10 would constitute "contributions" under FECA. AOR 2006-32 (Aug. 25 letter) at 4–7.[7]

i. The definition of "contribution." FECA defines "contribution" to include "any gift, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office." 2 U.S.C. § 431(8)(A)(i); *see also* 11 C.F.R. § 100.52(a). Commission regulations provide that anything of value received "in response to any

[7] The solicitations listed in the AOR as "Planned Communication" nos. 4 and 6 will be disseminated only by PFA.

communication is a contribution to the person making the communication if the communication indicates that any portion of the funds received will be used to *support or oppose* the election of a clearly identified Federal candidate." 11 C.F.R. § 100.57(a) (emphasis added).

In the Explanation and Justification (E&J) for 11 C.F.R. § 100.57, the Commission made clear that the rules "apply to all political committees, corporations, labor organizations, partnerships, organizations and other entities" that are "persons" under FECA. 69 Fed. Reg. 68056 (Nov. 23, 2004). The Commission continued: "The rules apply without regard to tax status, so they reach all FECA 'persons,' including, for example, entities described in or operating under section 501(c)(3), 501(c)(4), and 527 of the Internal Revenue Code." *Id*.

The Commission explained that:

> Many groups' fundraising solicitations will say nothing of an electoral objective regarding the use of funds (*i.e.*, that any funds provided in response to the solicitation will be used to support or oppose the election of clearly identified Federal candidates). Communications that do so, however, plainly seek funds "for the purpose of influencing Federal elections." Thus, the new rule appropriately concludes that such funds are "contributions" under FECA.

Id. at 68057.[8] The Commission concluded its E&J of rule 100.57(a) by making clear that:

> Any funds that are "contributions" by operation of new section 100.57 are contributions for purposes of the "political committee" definition in 2 U.S.C. 431(4)(A) and 11 CFR 100.5(a), which defines a "political committee" as any group that makes $1,000 of expenditures or receives $1,000 of contributions during a calendar year. In *Buckley v. Valeo*, 424 U.S. 1, 79 (1976), the Supreme Court narrowed the "political committee" definition with a "major purpose" test…. The "major purpose" test applies in the same way to groups that make or receive $1,000 of contributions and groups that make $1,000 of expenditures.

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[8] The rule 100.57(a) E&J provided examples of solicitations that would result in "contributions" under the rule:

- "The President wants to cut taxes again. Our group has been fighting for lower taxes since 1960, and we will fight to give the President four more years to fight for lower taxes. Send us money for our important work."
- "Our group strives to preserve Social Security, and Representative Jones has a great plan to protect this vital program. The Congressman needs *our help to stay in Washington* and implement his plan to save Social Security. Give now to help us fight to save Social Security."
- "Senator Jane Doe voted against a tax package that would have helped working families. Your generous gift will enable us to *make sure Californians remember in November*."

69 Fed. Reg. at 68057 (emphasis in original). The Commission explained that, because the solicitations indicate that the funds received will be used to support or oppose federal candidates, funds received in response to the solicitation are "contributions" under federal law. *Id.*

69 Fed. Reg. at 68058.

ii. The definition as applied to PFAVF's solicitations. PFAVF's proposed solicitations explicitly indicate that funds received will be used to support or oppose the election of federal candidates clearly identified in the communications. Consequently, funds received in response to these solicitations would be "contributions" under 11 C.F.R. § 100.57(a).

"Planned Communication #3" (emphasis added) states:

> We urgently need your help to *level the playing field*! As you know, a vast network of liberal 527 organizations are *outspending [federal candidate]* on television ads by a significant margin. These extremists have already raised more than $20 million in a relentlessly negative and intensely personal assault against [federal candidate]'s agenda….

"Planned Communication #3" indicates that PFAVF's preferred federal candidate is being outspent, and tells the recipient of the solicitation that the recipient's *help* (*i.e.*, contribution) will be used to *level the playing field* for (*i.e.*, support) this candidate. Funds received in response to this solicitation are "contributions" under 11 C.F.R. § 100.57(a).

Similarly, "Planned Communication #5" (emphasis added) reads:

> NEWSFLASH: Media Analysis Shows Liberals *Outspending [Senate candidate Y]* 2 to 1 in key areas of the State! … We need YOUR *help to raise $1 million* per week for the rest of the year in order to help offset the Liberals' spending advantage. PFAVF already has the [Senate candidate Y's opponent] *campaign on the run*, but we need YOUR help to expand our efforts to include additional battleground areas of the State and pay for additional TV ads… CONTRIBUTE NOW TO KEEP [SENATE CANDIDATE Y'S OPPONENT] CHASING US!

"Planned Communication #5" indicates that PFAVF's preferred federal candidate is being outspent, and tells the recipient of the solicitation that the recipient's *help* (*i.e.*, contribution) is needed to raise $1 million per week – and that the funds raised will be used to *offset the spending in support of their preferred candidate's opponent* (*i.e.*, support PFAVF's preferred candidate and/or oppose the opponent) and to expand PFAVF's TV ads into additional battleground areas in the state to keep the *opponent's campaign on the run* (*i.e.*, oppose the opponent). Funds received in response to this solicitation are "contributions" under 11 C.F.R. § 100.57(a).

"Planned Communication #7," which PFAVF plans to disseminate beginning in March 2008, straightforwardly asks the recipient of the communication to "help [PFAVF] promote [candidate for president Y]'s agenda with the greatest possible strength between now and November 3rd." This communication makes clear that the recipient of the solicitation's *help* (*i.e.*, contribution) will be used to *promote* (*i.e.*, support) PFAVF's preferred presidential candidate between the date of the solicitation and the date of the 2008 presidential election. Funds received in response to this solicitation would be "contributions" under 11 C.F.R. § 100.57(a).

"Planned Communication #8," which PFAVF intends to disseminate between now and November 1 of this year, states: "Please, help us support [Senate candidate Y]'s agenda in [State A] with the greatest possible strength between now and November 1st. Your generous support will help us raise the $1 million we need to dominate the [State A] airwaves and have a crucial impact on public opinion." A more clear-cut example of a solicitation of contributions under 11 C.F.R. § 100.57(a) is difficult to imagine. The solicitation clearly indicates that funds received will be used to *support* a clearly identified federal candidate and, thus, such funds would be "contributions" under FECA.

"Planned Communication #9" is a PFAVF Web site communication indicating that the organization is dedicated to keeping the issue record straight "on the campaign trail," accompanied by a picture of a federal candidate on a television screen, and a solicitation stating that funds received "will be used to fund 'TV ads' supporting the identified candidate's policies 'on the campaign trail." This solicitation clearly identifies a federal candidate and indicates that funds received as a result of the solicitation will be used to *support* the federal candidate. Consequently, the funds would be "contributions" under FECA.

PFAVF solicitations detailed in the AOR as "Planned Communication" nos. 3, 5, 7, 8, and 9 all clearly indicate that funds received in response to the solicitation will be used to support or oppose clearly identified federal candidates and, therefore, constitute "contributions."[9] In the event that these solicitations resulted in PFAVF's receipt of more than $1,000 in "contributions," and because it meets the major purpose test, PFAVF would be a "political committee" under 2 U.S.C. § 431(4)(A) and would be required to comply with the FECA contribution limitations, source prohibitions and reporting requirements established by 2 U.S.C. §§ 433, 434, 441a, and 441b.

III. The Commission Does Not Have Sufficient Information to Determine If PFA is a Federal "Political Committee."

The AOR also asks multiple questions about the activities and spending of PFA, a section 501(c)(4) organization affiliated with PFAVF. Most fundamentally, the AOR asks whether PFA, if it engages in activities similar to PFAVF, would also be considered to be a political committee.

As noted above, the determination of "political committee" status turns on a determination of a group's major purpose. This determination cannot fairly be made by the Commission based on review of the selective sampling of PFA's activities presented in the AOR.

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[9] "Planned Communication #10" describes a PFAVF communication inviting "potential donors" to "briefings" and stating: "Your participation is critical to our success in November! [Liberal donor S. …] says that he would give until it hurt to beat [Federal candidate Y], and we cannot let that happen!" Although this is a closer call because it is somewhat less explicit than the other examples, the statement that PFAVF is seeking "participation," *i.e.*, donations, because a liberal donor is trying to "beat" PFAVF's preferred candidate, and that PFAVF "cannot let that happen," combined with the statement that a donation is "critical" to PFAVF's "success in November, "all indicate that the money being solicited will be used to promote the group's preferred candidate and is thus a "contribution" under 11 C.F.R. § 100.57(a).

In the case of a section 527 group, like PFAVF, the group's decision to register with the IRS as a "political organization" should be accepted by the Commission as a statement by the group itself that it is organized "primarily" to influence elections.

But in the case of a group organized under section 501(c)(4), the determination of whether a group meets the "major purpose" test becomes the kind of fact-intensive determination that the courts followed in the *GOPAC* and *Malenick* cases, based on a review of the organization's overall activities.

The AOR does not present sufficient information about PFA's overall plans and activities to make this determination. In particular, for instance, the Commission would need to ascertain whether PFA will engage in activities other than the ones described in the AOR, what those activities are, and how much spending it will do on those activities. It would be wrong for the Commission to offer an opinion that a section 501(c)(4) organization does or does not meet the "major purpose" test based on a review of only a portion of the group's activities.

Because the application of the statutory term "expenditure" depends on a determination of whether the group has a "major purpose" to influence elections, as explained above, the AOR also does not present sufficient information to determine whether PFA's proposed communications would constitute "expenditures." The definition of "contribution" under 11 C.F.R. 100.57(a), however, as explained above, should be applied to solicitations to be made by PFA, since the Commission has made clear that the rule "appl[ies] without regard to tax status" and thus "reach[es] all FECA 'persons,' including, for example, entities described in or operating under section … 501(c)(4) … of the Internal Revenue Code." 69 Fed. Reg. 68056, *supra*..

IV. Conclusion

For the above-stated reasons, it would be improper and inappropriate for the Commission to respond to the questions presented by PFAVF in this AOR, in light of the ongoing enforcement action pending against PFAVF that raises the same questions that are raised in the AOR. If the Commission instead decides to address the questions presented by PFAVF, it should advise PFAVF that, based on the AOR, it would be a political committee, that its planned communications would constitute "expenditures" and that its planned solicitations would result in the receipt of "contributions," under the applicable tests. The Commission also should advise requestors that the AOR presents insufficient information to provide a response with regard to whether PFA is a "political committee" making "expenditures."

Sincerely,

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